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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JAMAREA DENZEL CAMPBELL, Defendant and Appellant.	H036646 (Santa Clara County Super. Ct. No. B1045752)

1. INTRODUCTION

The only issue presented by this appeal is whether defendant Jamarea Denzel Campbell is entitled to relief because the trial court imposed the maximum restitution fine of $10,000 at sentencing pursuant to the permissive formula in Penal Code section 1202.4, subdivision (b)(2)[1] after indicating earlier, at the change of plea hearing, that it would not.

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[1] Unspecified section references are to the Penal Code.

Section 1202.4, subdivision (b) states in part: "(2) In setting a felony restitution fine, the court may determine the amount of the fine as the product of two hundred dollars ($200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted."

Pursuant to a plea agreement, defendant was convicted by no contest pleas of four counts of robbery and he admitted personally using a firearm during one of them. He was sentenced to the agreed term of 15 years in prison and the maximum restitution fine was imposed, along with other fines, fees, and assessments.

On appeal defendant asserts that, prior to entering his plea, the trial court promised to impose a lower restitution fund fine when it stated to defendant and his two codefendants, "There is a formula so it probably won't be the minimum [of $200] but it definitely won't be anywhere near the maximum [of $10,000]. I will keep it as low pretty much as I can." Defendant argues that he is entitled to specific performance of that promise. We will affirm the judgment for the reasons stated below, after explaining that the court's statements about the restitution fine were not part of the plea bargain and that defendant has forfeited his objection to judicial misadvice.

2. THE PROCEEDINGS

On January 21, 26, 27, and 30, 2010, defendant and two codefendants participated in the armed robberies of four convenience stores, three in Mountain View and one in Sunnyvale. A complaint was filed charging defendant with 11 crimes, nine counts of second degree robbery (§§ 211–212.5, subd. (c); counts 1, 2, 3, 5, 6, 7, 8, 10, 11) and two counts of attempted second degree robbery (§ 664; counts 4 & 9). Counts 1, 4, 5, 6, 7, 8, 9, 10, and 11 alleged defendant's personal use of a firearm (§ 12022.53, subd. (b)), while counts 2 and 3 alleged that he was armed with a firearm (§ 12022, subd. (a)(1)).

At a change of plea hearing on November 23, 2010, the trial court announced "that the People have now made offers which each defendant is willing to accept." A deputy district attorney recited the terms of each of the three plea bargains. The terms of the disposition of defendant's case were that he would "plead guilty or no contest to Count 1 for the mitigated term of two years, admit the allegation pursuant to Penal Code Section 12022.53(B) for another ten years. Then he will plead guilty or no contest to Counts 5, 7 and 10, one-third the mid-term on each of those counts gives us another three years for a

total of 15 years, and the same Harvey[2] stipulation that the other two defendants are entering into."[3] The court established that the prosecutor would ask the court to strike the remaining counts and enhancements at sentencing.

The court proceeded to question each defendant individually regarding whether his plea was entered knowingly, intelligently, and voluntarily. The court established that the maximum term facing defendant was 49 years. Defendant personally denied that any other promises had been made to him to induce his plea other than what had been stated. The court obtained waivers from each defendant of his rights to a preliminary examination, to a jury trial, to confront and cross-examine witnesses, to present evidence, and to not incriminate himself.

The court explained that sentencing would not occur until the victims had been contacted regarding restitution claims. "But when you do come back for sentencing, I will be bound by the promises made here today, and accordingly I will impose sentence as agreed. That means you will not be granted probation. You will be sentenced to the California Department of Correction and Rehabilitation for the terms prescribed by this agreement.

"Of course, the court will make other orders as well. [One would prohibit possession of firearms or ammunition. Another would require samples of blood, saliva and fingerprints.]

"Additionally, the court could impose significant fines in this case, up to $10,000 per count, plus penalty assessments of 300 percent, but we're not going to do that. We do, however, have to impose certain fees which are mandatory, and they include a minimum $200 restitution fund fine on each felony case, plus $30 court security fee, $30 criminal conviction assessment, $10 fine plus penalty assessment for theft related

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[2] *People v. Harvey* (1979) 25 Cal.3d 754.

[3] One codefendant was going to admit two counts and a personal use enhancement, resulting in a 13-year sentence. The other was going to admit three counts without any enhancement, resulting in a four-year sentence.

offenses under Penal Code Section 1202.5. There is also another fee called the criminal justice administration fee of $129.75 each of which goes to the arresting agency, and there may be some other fees, but I don't think so[,] that might apply in this case.

"I note the maximum possible restitution fund fine is $10,000. There is a formula so it probably won't be the minimum but it definitely won't be anywhere near the maximum. I will keep it as low pretty much as I can, and those fees have to be paid over time from your earnings while in custody or while on parole, if you're able to do so. That will be monitored by your parole officer."

The court further advised about the possibility of victim restitution, possible immigration consequences, the effect of strike and serious convictions on future sentences, and the petty theft with a prior consequence.

After providing the advisements, the court asked defendant if he had any questions. Through counsel, defendant asked if the 15 percent custody credit limitation was discretionary and the court informed him it was mandatory. Thereafter defendant pleaded no contest to counts 1, 5, 7, and 10, and admitted personal use of a firearm during count 1.

At sentencing, defense counsel acknowledged receiving the probation report and waived the five and 10 day rule. The probation report recommended imposition of a 15-year sentence as well as various fines, fees, and assessments, including "A Restitution Fine of $10,000 be imposed under the formula permitted by Penal Code Section 1202.4 [subdivision] (b), " with a corresponding parole revocation fine suspended under section 1202.45.

Without any objection, the court imposed the agreed sentence of 15 years, as well "a restitution fund fine of $10,000 is imposed under the formula permitted by Penal Code Section 1202.4(B). Additional parole revocation restitution fund fine in like amount is suspended under 1202.45 pending successful completion of parole." The court imposed court security fees of $30 per count, criminal conviction assessments of $30 per count, a $129.75 criminal justice administration fee to the City of Mountain View, and a $10 fine plus penalty assessment under section 1202.5.

During the sentencing defendant personally asked for a lighter sentence through the CRC program. The court explained that defendant and his crimes did not qualify for CRC housing.

Defendant filed a notice of appeal without obtaining a certificate of probable cause. The notice of appeal asserted that "[t]his appeal is based on the sentence or other matters that occurred after the plea and do not affect its validity."

3. THE JUDGE'S RESTITUTION FINE COMMENTS WERE NOT PART OF THE PLEA BARGAIN.

On appeal defendant asserts that "[t]he imposition of a $10,000 restitution fine breached the plea bargain in violation of [his] due process rights." Defendant's mistaken premise is that what the trial court said about the restitution fine was part of defendant's plea bargain. As we will explain, the record establishes that what the court said was not intended either to describe the plea agreement reached by the prosecutor and defendant or to add a condition to that agreement.

People v. Orin (1975) 13 Cal.3d 937 (*Orin*) described the roles of the prosecution, the defendant, and the trial judge in arriving at plea bargains or agreements. "The process of plea bargaining which has received statutory and judicial authorization as an appropriate method of disposing of criminal prosecutions contemplates an agreement negotiated by the People and the defendant and approved by the court. (§§ 1192.1, 1192.2, 1192.4, 1192.5; *People v. West* (1970) 3 Cal.3d 595, 604-608.) Pursuant to this procedure the defendant agrees to plead guilty in order to obtain a reciprocal benefit, generally consisting of a less severe punishment than that which could result if he were convicted of all offenses charged. (*People v. West*, *supra*, 3 Cal.3d at p. 604.) This more lenient disposition of the charges is secured in part by prosecutorial consent to the imposition of such clement punishment (§ 1192.5), by the People's acceptance of a plea to a lesser offense than that charged, either in degree (§§ 1192.1, 1192.2) or kind (*People v. West*, *supra*, 3 Cal.3d at p. 608), or by the prosecutor's dismissal of one or more counts of a multi-count indictment or information. Judicial approval is an essential condition precedent to the effectiveness of the 'bargain' worked out by the defense and prosecution.

(§§ 1192.1, 1192.2, 1192.4, 1192.5; *People v. West, supra,* 3 Cal.3d at pp. 607-608.) But implicit in all of this is a process of 'bargaining' between the adverse parties to the case–the People represented by the prosecutor on one side, the defendant represented by his counsel on the other–which bargaining results in an agreement between them. (See *People v. West, supra,* 3 Cal.3d at pp. 604-605.)

"However, the court has no authority to substitute itself as the representative of the People in the negotiation process and under the guise of 'plea bargaining' to 'agree' to a disposition of the case over prosecutorial objection. Such judicial activity would contravene express statutory provisions requiring the prosecutor's consent to the proposed disposition, [fn. omitted] would detract from the judge's ability to remain detached and neutral in evaluating the voluntariness of the plea and the fairness of the bargain to society as well as to the defendant, and would present a substantial danger of unintentional coercion of defendants who may be intimidated by the judge's participation in the matter." (*Orin, supra,* 13 Cal.3d 937, 942-943; *People v. Segura* (2008) 44 Cal.4th 921, 929-930.) "If the court does not believe the agreed-upon disposition is fair, the court 'need not approve a bargain reached between the prosecution and the defendant, [but] it cannot change that bargain or agreement without the consent of both parties.'" (*People v. Segura, supra,* at p. 931.)

People v. Walker (1991) 54 Cal.3d 1013 (*Walker*) stressed the potential importance of restitution fines to plea bargaining. In *Walker*, the Supreme Court required, as a judicially declared rule of criminal procedure, that trial courts advise defendants who are pleading guilty that imposition of a restitution fine within the statutory range is one of the direct consequences of their pleas. (*Id.* at pp. 1020, 1022.)[4]

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[4] Subsequent case law has established that selecting a restitution fine amount above the statutory minimum is discretionary, not mandatory. (*People v. Tillman* (2000) 22 Cal.4th 300, 303; see *People v. Smith* (2001) 24 Cal.4th 849, 853; *People v. Dickerson* (2004) 122 Cal.App.4th 1374, 1379, fn. 5 (*Dickerson*).)

(Continued)

Walker also recommended that "the restitution fine should generally be considered in plea negotiations" (*id.* at p. 1024) and that "[c]ourts and the parties should take care to consider restitution fines during the plea negotiations." (*Id.* at p. 1030.) We assume that *Walker* intended courts to consider restitution fines during plea negotiations within the parameters of the judicial role described in *Orin*.

Subsequently, this court and the Supreme Court have recognized that the parties to a criminal case, the prosecution and the defendant, are free to enter a plea bargain on any legal terms they find mutually acceptable and may leave the amount of the restitution fine to the discretion of the sentencing court. (*Dickerson*, *supra*, 122 Cal.App.4th 1374, 1384 [" 'The parties to a plea agreement are free to make any lawful bargain they choose.' "]; *People v. Sorenson* (2005) 125 Cal.App.4th 612, 619 (*Sorenson*) [same]; *People v. Crandell* (2007) 40 Cal.4th 1301, 1309 (*Crandell*) ["the parties to a criminal prosecution are free, within such parameters as the Legislature may establish, to reach any agreement concerning the amount of restitution (whether by specifying the amount or by leaving it to the sentencing court's discretion) they find mutually agreeable.' "] Notwithstanding *Walker*'s recommendation, the parties, in reaching a sentence bargain or a charge bargain as to the uncontested charges, may agree explicitly or implicitly to leave "the imposition of fines to the discretion of the sentencing court." (*Dickerson*, *supra*, 122 Cal.App.4th at

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Section 1202.4, subdivision (d) identifies circumstances relevant to the amount of the fine. "In setting the amount of the fine pursuant to subdivision (b) in excess of the two hundred-dollar ($200) or one hundred-dollar ($100) minimum, the court shall consider any relevant factors, including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered any losses as a result of the crime, and the number of victims involved in the crime. Those losses may include pecuniary losses to the victim or his or her dependents as well as intangible losses, such as psychological harm caused by the crime. Consideration of a defendant's inability to pay may include his or her future earning capacity. A defendant shall bear the burden of demonstrating his or her inability to pay. Express findings by the court as to the factors bearing on the amount of the fine shall not be required."

p. 1384; *Sorenson*, *supra*, 125 Cal.App.4th at p. 619; cf. *Crandell*, *supra*, 40 Cal.4th at p. 1309.)

Dickerson, *Sorenson*, and *Crandell* all rejected claims like defendant's that imposition of a restitution fine above the minimum violated their plea bargains. In affirming an unpublished decision by this court, *Crandell* stated, "As the Court of Appeal majority below correctly observed, '[*In re*] *Moser* [(1993) 6 Cal.4th 342] and [*People v.*] *McClellan* [(1993) 6 Cal.4th 367] teach that the core question in every case is . . . whether the restitution fine was actually negotiated and made a part of the plea agreement, or whether it was left to the discretion of the court.' When a restitution fine above the statutory minimum is imposed contrary to the actual terms of a plea bargain, the defendant is entitled to a remedy. In this case, however, because the record demonstrates that the parties intended to leave the amount of defendant's restitution fine to the discretion of the court, defendant is not entitled to relief." (*Crandell*, *supra*, 40 Cal.4th 1301, 1309.)

In *Crandell*, there was no express agreement on the record to leave the restitution fine to the sentencing court. In finding such an implicit agreement, the court pointed out "that the trial court, before taking defendant's plea, accurately advised him he would 'have to pay a restitution fund fine of a minimum of $200, a maximum of $10,000' and ascertained that the prosecution had not made 'any other promises' beyond that defendant would be sentenced to 13 years in prison." (*Crandell*, *supra*, 40 Cal.4th 1301, 1309.) "In light of these circumstances, it is clear that when defendant entered his plea, he could not reasonably have understood his negotiated disposition to signify that no substantial restitution fine would be imposed." (*Id.* at p. 1310.)

In *Dickerson*, *supra*, 122 Cal.App.4th 1374, this court similarly found that "the parties at least implicitly agreed that additional punishment in the form of statutory fines and fees would be left to the discretion of the sentencing court." (*Id.* at p. 1386.) *Dickerson* noted four circumstances in support of this conclusion. When the plea bargain was recited, there was no mention of the restitution fine. (*Id.* at p. 1385.) When asked by the trial court, the defendant "denied that any promises had been made other than fixing

the prison term." (*Ibid.*) The "defendant acknowledged before entering his pleas that the court 'must impose a restitution fine of between $200 and $10,000.'" (*Ibid.*) Finally, though the probation report recommended a restitution fine of $6,800 pursuant to the statutory formula, the defendant did not object at sentencing when that fine was imposed. (*Ibid.*)

As the Attorney General asserts, the record in this case does not support defendant's assumption that what the court said about the restitution fine was part of defendant's plea bargain. At the change of plea hearing, the trial court had a deputy district attorney recite the terms of the charge and sentence bargains reached by each of three codefendants. The plea bargain established a certain sentence for defendant and limited the number of his convictions. The prosecutor stated no agreement about a restitution fine, either specifying the minimum, an amount above the minimum, or even upper or lower limits within the statutory range of possible fines. Each codefendant affirmed that no other promises had been made to him apart from those previously stated.

After the plea agreement was stated, the court explained that it would be bound by those promises at sentencing, and that it would be making "other orders as well," including imposing restitution fines. As to those fines, the court accurately advised the codefendants that the minimum restitution fund fine of $200 was mandatory, while the maximum was $10,000.[5] The court went on to state: "There is a formula so it probably

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[5] Section 1202.4 provides in part: "(b) In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record.

"(1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than two hundred dollars ($200), and not more than ten thousand dollars ($10,000), if the person is convicted of a felony, and shall not be less than one hundred dollars ($100), and not more than one thousand dollars ($1,000), if the person is convicted of a misdemeanor."

won't be the minimum but it definitely won't be anywhere near the maximum. I will keep it as low pretty much as I can."[6]

The trial court made a clear distinction between the terms of the plea bargain and the other orders it was required to impose. It is obvious from this record that the amount of the restitution fine was not a term or condition of the plea agreement reached between the prosecutor and defendant. Just as in *Dickerson*, *Sorenson*, and *Crandell*, each codefendant left the amount of the restitution fine to the discretion of the sentencing court. What the court said about the fine was clearly not intended to describe a condition of the bargain and it did not create a new condition. As the plea agreement implicitly contemplated that the trial court would determine the amount of the restitution fine, "the imposition of the restitution fine did not violate the plea bargain." (*People v. DeFilippis* (1992) 9 Cal.App.4th 1876, 1879.)

Defendant responds that, based on the trial court's advice, imposition of a maximum restitution fine could not have been within his knowledge and contemplation at the time he entered his plea, citing this court's decision in *People v. Knox* (2004) 123 Cal.App.4th 1453 (*Knox*). *Knox* was another appeal challenging imposition of a restitution fine above the minimum as a violation of the plea bargain. *Knox*, like *Dickerson*, *supra*, 122 Cal.App.4th 1374, rejected this challenge, but by applying a different analysis. According to *Knox*, "the critical consideration is whether the

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[6] While using the statutory formula in footnote 1, *ante*, is discretionary and not mandatory, the trial court indicated that it would follow the formula. We note that as to defendant's codefendants, application of the formula, which multiplies the number of felony convictions times the number of years of imprisonment times the minimum $200 fine, would result in fines not anywhere near the $10,000 maximum. For the codefendant admitting three counts and receiving a term of four years, the formula fine would be $2,400. For the codefendant admitting two counts and receiving a term of 13 years, the formula fine would be $5,200. It is only for defendant, who admitted four counts and received a 15-year term, that the formula fine would be $12,000 if not limited to a maximum of $10,000. So what the court said was accurate as to the codefendants.

challenged fine was within the 'defendant's contemplation and knowledge' when he entered his plea." (*Knox, supra*, 123 Cal.App.4th 1453, 1460.)

In reviewing the record, *Knox* noted that "the primary focus of the on-the-record plea discussions in this case was the length of defendant's prison sentence." (*Knox, supra*, 123 Cal.App.4th 1453, 1460.) "In addition to the prison term, however, other aspects of the plea also were discussed. The mandatory restitution fund fine was among them. That discussion took place prior to the entry of defendant's plea. In addition, we note, the court won defendant's acknowledgement that he understood each of the consequences that were discussed, including the prison term and the restitution fine. The fine thus was within 'defendant's contemplation and knowledge' when he entered his plea." (*Id.* at p. 1461.) "Because the fine was within defendant's contemplation when he entered his plea, its imposition did not violate the plea agreement." (*Id.* at p. 1463.)

We recognize that *Knox* can be read to reflect an expansive notion of the plea agreement as including all judicial advice prior to the entry of the defendant's plea. Such a notion, however, blurs the distinction between the agreement negotiated between the prosecutor and the defendant and the mandatory judicial advice about the direct consequences of a guilty plea.

In *Crandell*, the California Supreme Court had an opportunity to adopt *Knox*'s identification of "the critical consideration" being the defendant's contemplation and knowledge when he entered his plea. The unpublished opinion under review repeated that language several times.[7] Instead, however, what the higher court quoted with approval was " 'that the core question in every case is . . . whether the restitution fine was actually negotiated and made a part of the plea agreement, or whether it was left to the

[7] *Crandell* did not mention either *Knox, supra*, 123 Cal.App.4th 1453 or *Dickerson, supra*, 122 Cal.App.4th 1374, although the unpublished opinion under review relied on both of them.

discretion of the court.'" (*Crandell, supra*, 40 Cal.4th 1301, 1309.) We understand *Crandell* to have implicitly disapproved of *Knox*'s alternative analytical approach.

Whatever defendant might have known, contemplated, or thought about the trial court's prediction of a "low" restitution fine resulting from the statutory formula, it should have been clear to defendant from the preceding discussion that the imposition and amount of the restitution fine were not conditions of the plea bargain. As the plea agreement did not specify a low, middle, or high fine, imposition of the maximum fine did not violate the plea agreement.

People v. Mancheno (1982) 32 Cal.3d 855 (*Mancheno*), on which defendant relies, deserves particular attention. In that case, like this one, the defendant and two codefendants were charged with four armed robberies of three convenience stores and a restaurant. (*Id.* at p. 858.) "[P]ursuant to a plea bargain, defendant entered pleas of guilty to two counts of robbery and admitted the armed allegation." (*Ibid.*) The court at the change of plea hearing elicited that the defendant had requested the court to provide a diagnostic study from the Department of Corrections. (*Ibid.*)

Also at the change of plea hearing, the defendant agreed to the following statements by the prosecutor. "'You and I and the Judge have talked about this and you have agreed you want to plead to Counts III and IV in that allegation and plead to the two armed allegations and the Judge would go ahead with what he told you earlier with the diagnostic study and concurrent time." (*Mancheno, supra*, 32 Cal.3d 855, 858-859.) "'Now, the Judge has made a promise to you that after the diagnostic study if he chooses to send you to prison it would be concurrent. In other words, Counts III and IV would run at the same time.'" (*Id.* at p. 859.) At sentencing a month later, "there was no mention of the term of the plea bargain calling for a diagnostic study. Defendant was then sentenced to four years in state prison," which included concurrent terms. (*Ibid.*)

The Supreme Court identified as the issues on appeal "whether the agreement was violated by the failure of the trial court to implement one of the terms of the plea bargain and, if so, what is the proper remedy." (*Mancheno, supra*, 32 Cal.3d 855, 858.) The court stated: "'This phase of the process of criminal justice, and the adjudicative element

inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.' (*Santobello v. New York* [(1971)] 404 U.S. at p. 262.)

"The Supreme Court has thus recognized that due process applies not only to the procedure of accepting the plea (see *Boykin v. Alabama* (1969) 395 U.S. 238), but that the requirements of due process attach also to implementation of the bargain itself. It necessarily follows that violation of the bargain by an officer of the state raises a constitutional right to some remedy." (*Mancheno, supra*, 32 Cal.3d 855, 860.)

Defendant asserts that "*Mancheno* applied *Santobello* to a promise made by the court." As the Attorney General retorts, however, a close reading of *Mancheno* reveals that "the diagnostic report was part of the plea bargain with the People that the judge approved."

While the main issue on appeal was identifying the appropriate remedy for the breach of a plea bargain (*Mancheno, supra,* 32 Cal.3d 855, 860-864), the court also clarified the nature of the court's statements about the diagnostic study. On the one hand, the court rejected a claim that the diagnostic study was not a term of the bargain. "The Attorney General argues that the diagnostic study was 'merely the procedure leading to the promised concurrent sentence,' thus not really a term or condition of the plea bargain. This contention is not supported by the record. The only reasonable interpretation of the dialogue between the judge and the defendant is that the court made the diagnostic study a term of the bargain." (*Id.* at p. 864.)

This alone could be read to suggest that the trial court added a term to the bargain. However, the high court immediately clarified the situation. In rejecting a claim that the defendant had waived the diagnostic study at sentencing, the court stated: "At the time of the proceedings in question, defendant had a right to the referral for diagnostic study because it was one of the terms of the bargain specifically agreed to by the People and

approved by the court in exchange for defendant's guilty plea." (*Mancheno*, *supra*, 32 Cal.3d 855, 864.)

In other words, though *Mancheno* did not cite *Orin*, *supra*, 13 Cal.3d 937, the Supreme Court believed that the bargain in *Mancheno* conformed to the paradigm authorized by *Orin*, namely, a plea agreement negotiated between the prosecution and the defense which called for some specified judicial action. Saying "the court made the diagnostic study a term of the bargain" was an unfortunate choice of words, but we do not believe it was intended to alter the *Orin* paradigm. Rather, the defendant in *Mancheno* desired to obtain a diagnostic study, which required a court order, and the People agreed to that as a condition of the plea bargain. The trial court "made" it a term of the bargain simply by approving of it along with all the other terms of the bargain.

In short, we do not understand *Mancheno* as authorizing trial courts to add new terms to plea agreements reached between prosecutors and defendants. Even if it does, in our case it is clear that the trial court, in discussing its obligation to impose a restitution fine, was neither adding a new term to the parties' bargain nor describing one of the terms of the parties' bargain. What the court was doing was describing one of the direct consequences of a guilty plea, and any error in its description does not amount to condition of the plea agreement, such that a breach amounts to a violation of the agreement.

4. DEFENDANT'S CLAIM IS FORFEITED.

The Attorney General characterizes what the trial court said as "an informative indicated sentence." This is inaccurate. One of the features of an indicated sentence is that the defendant has agreed to plead to the sheet, admitting all charges and enhancements. (*People v. Superior Court* (*Smith*) (1978) 82 Cal.App.3d 909, 915; *People v. Vergara* (1991) 230 Cal.App.3d 1564, 1567; *People v. Superior Court* (*Ramos*)

(1991) 235 Cal.App.3d 1261, 1271[8]; see *People v. Allan* (1996) 49 Cal.App.4th 1507, 1516; *People v. Turner* (2004) 34 Cal.4th 406, 418-419.) That is not what occurred in this case. The parties agreed to the dismissal of several counts and enhancements to reach the agreed sentence.

The Attorney General's alternative characterization is more accurate, that the court misadvised defendant of the consequences of his plea.

We reiterate that *Walker* requires trial courts to advise defendants who are pleading guilty that a restitution fine between $200 and $10,000 will be imposed. (*Walker, supra*, 54 Cal.3d 1013, 1022.) *Walker* also determined that, because such advice is not constitutionally required, "when the only error is a failure to advise of the consequences of the plea, the error is waived if not raised at or before sentencing. Upon a timely objection, the sentencing court must determine whether the error prejudiced the defendant, i.e., whether it is 'reasonably probable' the defendant would not have pleaded guilty if properly advised." (*Walker, supra*, 54 Cal.3d 1013, 1020.)

In *Walker*, the Supreme Court concluded that the defendant had forfeited his objection that the trial court had completely failed to advise him about the prospect of a restitution fine. (*Walker, supra*, 54 Cal.3d 1013, 1029.) However, the court also concluded that the subsequent imposition of a $5,000 restitution fine "was a significant deviation from the negotiated terms of the plea bargain. Since the court did not give the section 1192.5 admonition, and this was not merely a failure to advise of the consequences of the plea, defendant cannot be deemed to have waived his rights by silent acquiescence." (*Id.* at pp. 1029-1030.)

As we explained in *Dickerson*, the court in *Walker* " 'implicitly found that the defendant *in that case* reasonably could have understood the negotiated plea agreement to signify that no substantial fine would be imposed.' (*In re Moser, supra*, 6 Cal.4th [342]

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[8] This court disagreed with *Ramos* on another point in *People v. Clancey* (2012) 202 Cal.App.4th 790, 800.

at p. 356, italics added; [*People v.*] *McClellan, supra*, 6 Cal.4th [367] at pp. 379-380." (*Dickerson, supra*, 122 Cal.App.4th 1374, 1384.) We have already concluded that defendant in this case implicitly left the determination of the amount of the restitution fine to the trial court. His plea bargain did not restrict the fine's amount.

Thus, defendant's true complaint here is not about a breach of the plea bargain, but about judicial misadvice or an underestimate of the amount of the fine that would result from application of the statutory formula. The contemporaneous objection requirement is the same, whether the complaint is omitted advice or judicial misadvice. On appeal defendant claims to have been surprised by a restitution fine in an amount higher than the "low" fine described at the change of plea hearing, though no higher than what the probation report recommended. We conclude that defendant was required to register his claim of surprise by an objection in the trial court, and, because he did not, this claim is forfeited. (*Dickerson, supra*, 122 Cal.App.4th 1374, 1386-1387.)

5. DISPOSITION

The judgment is affirmed.

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WALSH, J.*

WE CONCUR:

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PREMO, ACTING P.J.

_____
MIHARA, J.

*Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.